

**HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION Stamp NO. 8289 OF 2006.**

State Bank of Sourashtra.

..Petitioner.

Versus.

Mr. Mahendra P. Dholakia.

..Respondent.

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Shri. Janak Dwarkadas, Senior Counsel with Shri. N. C. Balsara instructed by Messers Negandhi, Shah & Himayatullah for the Petitioner.

Shri. Mahendra P. Dholakia party in person for the respondent.

**CORAM: S.B.MHASE, J.**

**DATE : APRIL 5, 2006.**

**P.C.**

1. Heard. Petitioner is a bank. Suit bearing No. T.E. & R. Suit No. 31/39 of 2003 was filed by the respondent - landlord against the petitioner - bank who is the tenant, in the Court of Small Causes at Mumbai (Bandra Branch) for possession of flat No. 134 admeasuring 2075 sq. feet situated on ground floor of A-Wing of Rajkiran Building, Situated at M.G.Road, Kandivali (West), Mumbai 400 067, and also for the mesne profits. By judgment and decree dated 29th August 2005, the Small Causes Court at Mumbai decreed the suit and directed the petitioner - original defendant to deliver

the vacant possession of the suit premises to the plaintiff - respondent within a period of four months. The decree was also passed for mesne profits. It appears that thereafter the said decree was further stayed for a period of two months so as to enable the petitioner-bank to file an appeal as against the said decree. It appears that the appeal was preferred, however, the said appeal was not within time and there was delay of eight days. Therefore, delay condonation application was also preferred. The said appeal was shown on stamp being Appeal Stamp No. 42 of 2006. It appears that before the appellate Court the motion was taken out for interim stay of the decree. The matter appeared before the appellate Court on 4.4.2006 and the following order was passed:

|           |                        |                                            |
|-----------|------------------------|--------------------------------------------|
|           |                        | "Issue notice to the respondents. Advocate |
| Mr.       | Chandan                | for respondents waives service             |
| and       | wants to file a reply. | Adjourned to                               |
| 12.4.2006 | at                     | 2.30 p.m."                                 |

2. Thus, the matter was not considered on 4.4.2006 for grant of interim relief. It requires to be noted that application which was moved on 4.4.2006 contains following prayers.

"(a) the Hon'ble Court be pleased to restore

the possession of the suit premises forthwith, pending hearing and disposal of application of condonation of delay and appeal.

possession of the premises as and when the appellants undertake to handover back to the Respondents required by this Hon'ble Court.

granted (c) in The ad-interim and interim reliefs be in terms of prayer (a)."

3. Thus, from this application it is evident that the decree which was passed against the petitioner (original defendant-tenant) was executed by the executing Court on 3.4.2006 and the possession of the suit premises was taken and handed over to the landlord. Under these circumstances, the request for restoration of the possession pending the delay condonation application is being claimed. As stated earlier, in that application after giving notice to the respondent the matter was adjourned to 12.4.2006. Since the petitioner-bank has lost the possession and their premises are locked and their attempt to get the possession restored through the Appellate Bench of the Small Causes Court has failed, this petition has been moved making a grievance that on 4.4.2006 when the application for restoration of possession was pressed, it was not heard and the Appellate Court adjourned the matter to 12.4.2006. It is submitted that as a result

of it the whole business of the said branch of the  
petitioner - bank has come to a stand still.

4. It is admitted position on record that there  
is a decree passed as against the present petitioner in  
T.E. & R. Suit No. 31/39 of 2003 dated 29th August  
2005 and the said decree was executed and in execution  
of the said decree, the possession of the premises in  
question was handed over to the decree holder-landlord,  
who is the respondent in the present petition. It is  
equally admitted position that on 3.4.2006 when the  
decree was executed there was no stay operating as  
against the said decree passed by the Small Causes Court  
or by the Appellate Bench of the said Court. Now, the  
submission made at bar is that, in fact, those premises  
are simplicitor locked and all the properties of the  
Bank are still in the said premises, therefore, it  
cannot be said that the possession of the said premises  
has been taken, in the real sense. It is submitted that  
with the help of the bailiffs the premises are taken  
over and are delivered to the landlord and such delivery  
of possession cannot be held to be a valid delivery of  
possession. Therefore, it is claimed that this Court  
should exercise its extra-ordinary power under Articles  
226 & 227 of the Constitution of India and shall restore  
the possession and/or direct the trial Court to remove

the locks and allow the petitioner-bank to operate from the said premises. I find that the said submissions, at this stage, cannot be accepted. It is well settled position in law that all questions of discharge and satisfaction of the decree are required to be adjudicated and decided by the executing Court. Therefore, the grievance of the petitioner as to whether there is a real, factual and legal delivery of possession or not is a question concerning the discharge and satisfaction of the decree which has to be placed before the executing Court by the Petitioner. Therefore, the appropriate remedy in respect of the challenge to the possession receipt, etc., is before the executing Court and in stead of following the said remedy, the petitioner has approached to this Court. Therefore, this Court is not inclined to entertain the petition.

5. So far as restoration is concerned, the prayer is covered by section 144 of the Code of Civil Procedure, 1908 which states that:

"144. Application for restitution: - (1) Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled to

any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order."

5. Therefore, the remedy of the petitioner to ask for restitution and restoration of the possession is available to the petitioner in case the decree is modified, varied, or annulled or set aside by the appellate Court thereby entitling the petitioner for restoration of the property. For whatever reasons, once the possession is delivered, unless and untill the decree is reversed, as contemplated under section 144 of the Code of Civil Procedure, 1908 the claim of the restitution cannot be considered and much more this cannot be considered in writ petition like this when the several remedies under the Code of Civil Procedure are available to the petitioner. This Court finds it appropriate to mention that probably in a supervisory jurisdiction the Court can chanelise the proceedings in the trial Court, provided it is pointed out that the Courts below have by-passed the mandatory procedure to the prejudice of the petitioner. In spite of the

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specific query being made in this respect, nothing has been pointed out to this Court as to what are the errors of serious nature committed by the Courts below which call for the interference under Articles 226 & 227 of the Constitution of India. Viewed from any angle, no interference is called for. Petition is hereby rejected.

**(S.B.MHASE, J.)**